

U.S. Department of Labor

Office of Administrative Law Judges

525 Vine Street, Suite 900
Cincinnati, OH 45202

Telephone: (513) 684-3252
Facsimile: (513) 684-6108



Date: October 31, 2000

Case No.: 2000-BLA-0490

In the Matter of:

VERNON RAY WHITLEDGE,
Claimant

v.

WEBSTER COUNTY COAL CORPORATION,
Employer

MAPCO, INCORPORATED,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:¹

Joseph H. Kelley, Esq.
For the Claimant

Charles E. Lowther, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

¹ Attorney Kelley appeared at the hearing and presented a waiver of right to appear and present oral testimony. The waiver is signed by the Claimant and his attorney and attorney for the Employer. Neither the Claimant nor the Employer's attorney appeared at the hearing. The Director, OWCP, was not represented at the hearing.

This proceeding arises from a claim filed by Vernon Ray Whittledge for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901, et seq., as amended (Act). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP), for a formal hearing. The regulations issued under the Act are located in Title 20 of the Code of Federal Regulations, and regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Benefits under the Act are awarded to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. Survivors of persons who were totally disabled at their times of death or whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment and is commonly known as black lung disease.

The case was called for hearing on August 29, 2000, at Madisonville, Kentucky. The parties waived oral testimony. The findings and conclusions that follow are based on a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

Vernon Ray Whittledge filed the instant claim for benefits on February 8, 1999. The claim was denied by OWCP. Webster County Coal Corporation was named as the Responsible Operator and filed a Notice of Controversion. A formal hearing was requested and the case was transferred to the Office of Administrative Law Judges on February 23, 2000.

The Claimant previously filed a claim for benefits on December 16, 1996 (DX 19).² The claim was denied by the District Director on April 17, 1997. No further action was taken and the denial became final.

II. ISSUES

² In this Decision and Order, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the hearing.

The specific issues presented for resolution are:

1. Whether the Miner has pneumoconiosis as defined in the Act and the regulations;
2. Whether the Miner's pneumoconiosis arose out of coal mine employment;
3. Whether the Miner is totally disabled;
4. Whether the Miner's disability is due to pneumoconiosis;
5. Whether the named Employer is the Responsible Operator; and,
6. Whether the evidence establishes a material change in conditions per 20 C.F.R. § 725.309(d).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Claimant's Background

The Claimant, Vernon Ray Whitledge, was born on December 11, 1928 and was seventy-one years old at the time of the hearing (DX 1). He has an eleventh-grade education. He has one dependent for purposes of augmentation of benefits, his wife, Louie Earl Whitledge, whom he married on July 12, 1952 (DX 1; DX 19, p. 147).

The parties stipulated to thirty-six years of coal mine employment. All of the Claimant's coal mine employment took place in the Commonwealth of Kentucky. It is uncontested that Webster County Coal Corp. has been properly designated as the Responsible Operator.

IV. MEDICAL EVIDENCE

The following medical evidence was submitted after the denial of the prior claim and will be considered in this "Duplicate Claim" under the standard given in *Sharondale, infra*.

A. X-ray Studies

	<u>Date</u>	<u>Exhibit</u>	<u>Doctor</u>	<u>Reading</u>	<u>Standards</u>
1.	7/11/00	EX 2	Gallo	Category 0	not listed
2.	8/17/99	DX 14	Sargent B rdr/BCR	Completely negative	Fair
3.	8/17/99	DX 13	Traughber	0	Fair

B. Pulmonary Function Studies

	<u>Date</u>	<u>Exhibit</u>	<u>Doctor</u>	<u>Age/ Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/ FVC</u>	<u>Standards</u>
1.	7/11/00	EX 3	Gallo	71/69"	2.23	3.35	30	47%	Erratic effort; tracings not optimum.
2.	8/17/99	DX 13	Traughber	70/68"	1.45	1.9	6.0	--	Fair coop. and comp.

Comment: Vents were found unacceptable because equipment did not meet specifications; no volume/time traces of FVC, FEV₁ (DX 13).

C. Arterial Blood Gas Studies

	<u>Date</u>	<u>Exhibit</u>	<u>pCO₂</u>	<u>pO₂</u>
1	7/11/00	EX 2	38.8	101
.				
2	8/17/99	DX 13	35	82
.				

D. Narrative Medical Evidence

1. a. Dr. William Houser examined the Claimant on December 14, 1999, at which time he reviewed the Claimant's symptoms and smoking history (nonsmoker for forty years), performed a physical examination, and administered a pulmonary function study (mild airway obstruction). Dr. Houser diagnosed: (1) Coal workers' pneumoconiosis, category 1; (2) Chronic obstructive pulmonary disease (mild); (3) Arteriosclerotic heart disease (DX 17).

b. Dr. William Houser, in a letter dated December 20, 1996, wrote that Mr. Whitledge has been under his care since February 1992. He noted a nonsmoking history, an x-ray dated February 13, 1992 showing category 1 pneumoconiosis, and thirty-six years of coal mine employment. Dr. Houser reviewed an x-ray dated September 30, 1996 and two pulmonary function studies dated September 30 1996 and February 13, 1992. Dr. Houser opined that the Claimant has evidence of coal workers' pneumoconiosis, category 1, and stated that the pulmonary function studies are within normal limits (DX 9).

2. Dr. Sam Traughber examined the Claimant on August 11, 1999, at which time he reviewed the Claimant's symptoms and his occupational (twenty-seven years coal mine employment), medical (open heart surgery 1992; hernia surgery), smoking (stopped fifty years ago), and family histories, performed a physical examination, pulmonary function study, and arterial blood gas study, and interpreted an x-ray and an EKG. Dr. Traughber diagnosed: (1) ASCVD, status post CABG due to arteriosclerosis; and, (2) Chronic obstructive airway disease due in part to cigarette smoking though history is minimal. He opined that the Claimant has severe restrictive ventilatory deficit, etiology unknown, and found no evidence of pneumoconiosis on chest x-ray (DX 13).

3. Dr. Thomas A. Gallo examined the Claimant on July 11, 2000, at which time he reviewed the Claimant's symptoms and his occupational (thirty-nine years of coal mine employment, thirty-one years underground), medical (bypass surgery 1992), smoking (not significant), and family histories, performed a physical examination, pulmonary function study (erratic effort; tracings not optimum), arterial blood gas study (normal), and interpreted an x-ray (category 0) and an EKG (left axis deviation). Dr. Gallo diagnosed coronary artery disease, status post coronary artery bypass surgery, and opined that the Claimant does not have coal workers' pneumoconiosis. Dr. Gallo is Board certified in Internal Medicine and Pulmonary Disease (EX 1-3).

4. In a letter dated March 5, 1999 to Dr. Schymik, Dr. Casino wrote that he examined Mr. Whittle for pre-operative clearance for left inguinal hernia repair. He noted "a history of black lung disease" without reference to the basis for same (DX 10). Dr. Schymik saw the Claimant on March 15, 1999 regarding a left inguinal hernia. The record contains an operative report from St. Mary's Medical Center concerning the Claimant's hernia operation on March 15, 1999 and 1999 office visit notes by Dr. Cole (DX 11).

5. The record contains office visit notes from Dr. Robert Parker dated July 7, 1997 which appears to be an annual checkup following surgery regarding angina. He listed his impression as: (1) Angina, stable; and, (2) Black lung disease (DX 8).

V. DISCUSSION AND APPLICABLE LAW

The Claimant filed his first claim on December 16, 1996, which was denied on April 17, 1997. He filed the current claim on February 8, 1999, more than one year after the previous denial, thereby constituting this as a duplicate claim. Section

725.309 governs the review of duplicate claims. The United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), adopted the following standard for determining whether a miner has established a material change in conditions. The Court stated:

. . . to assess whether a material change is established, the ADMINISTRATIVE LAW JUDGE must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the Administrative Law Judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Id. at 997-98.

The present claim arises in the Sixth Circuit. Therefore, I will apply the *Sharondale* standard to the instant case. The Claimant's previous claim was denied when the Claimant failed to establish pneumoconiosis, pneumoconiosis arising out of coal mine employment, and that he was totally disabled due to pneumoconiosis. Pursuant to *Sharondale*, in order to show a material change in conditions, the Claimant must now prove at least one of the elements of entitlement previously adjudicated against him.

Because the Claimant filed this claim after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. Part 718. Section 718.202 provides four means by which a claimant may establish pneumoconiosis. Under § 718.202(a)(1), a claimant may prove that he has pneumoconiosis on the basis of x-ray evidence.

The record contains three interpretations of two different x-rays. All of these interpretations are negative for the presence of pneumoconiosis. I find that the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. § 718.202(a)(1).

Under § 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy results. This section is inapplicable in this case because the record does not contain biopsy or autopsy results. Additionally, § 718.202(a)(3) is not

available because none of the presumptions of §§ 718.304, 718.305, and 718.306 apply to the facts of this case.

Section 718.202(a)(4) provides that a claimant may establish the existence of pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the claimant suffers from pneumoconiosis as defined in § 718.201. Section 718.201 defines pneumoconiosis as a chronic dust disease of the lung, including respiratory or pulmonary impairments, arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. See *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *King v. Consolidation Coal Co.*, 8 B.L.R. 1-262, 1-265 (1985).

The record contains reports from Drs. Traughber, Gallo, and Houser. Drs. Schymik, Casino, Parker, and Cole also have notes in the file. Dr. Casino mentioned a history of black lung disease but gave no basis for his comment and, therefore, it is given little weight. Dr. Schymik's notes are concerned only with the hernia repair. The notes of Dr. Cole and Dr. Parker do not contain any information pertinent to the pending claim. Dr. Parker does mention Black Lung disease but it is a conclusory statement with no support.

Dr. Traughber diagnosed: (1) ASCVD, status post CABG due to arteriosclerosis; and, (2) Chronic obstructive airway disease due in part to cigarette smoking though history is minimal. He opined that the Claimant has severe restrictive ventilatory deficit, etiology unknown, and found no evidence of pneumoconiosis on chest x-ray. His opinion is based on examination, histories, testing, and symptoms. Dr. Gallo is Board certified in Internal Medicine and Pulmonary Disease, and he diagnosed coronary artery disease, status post coronary artery bypass surgery, and opined that the Claimant does not have coal workers' pneumoconiosis. His opinion is based on examination, histories, symptoms, and objective testing. The opinions of Dr. Traughber and Dr. Gallo are reasoned, documented, and supported by the objective medical evidence and entitled to substantial weight.

Dr. Houser, on December 14, 1999, diagnosed coal workers' pneumoconiosis, category 1, chronic obstructive pulmonary disease (mild), and arteriosclerotic heart disease. In December 1992, Dr. Houser diagnosed coal workers' pneumoconiosis, category 1, and stated that the pulmonary function studies were within normal limits. This diagnosis is similar to his opinion in 1999 and does not show a material change in condition. Dr. Houser's diagnosis of pneumoconiosis is apparently based, at least partially, on a 1992 x-ray. The record does not show that he took a new x-ray in 1999. Dr. Houser references a spirometry but the record does not contain the results of a study performed close to the date of his examination. I find that Dr. Houser's report is similar to his earlier diagnosis and does not show a material change in condition. In addition, I find the reports of Drs. Traughber and Gallo to be better reasoned and documented and entitled to greater weight.

For these reasons, I find that the Claimant has failed to establish the existence of pneumoconiosis and, therefore, cannot establish entitlement to benefits.

VI. ENTITLEMENT

The Claimant, Vernon Ray Whitledge, has failed to establish the existence of pneumoconiosis and, therefore, has failed to establish a material change in condition.

VII. ATTORNEY'S FEES

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Vernon Ray Whitledge for benefits under the Act is hereby DENIED.

ROBERT L. HILLYARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Room S-5220, Washington, D.C., 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.